DIVISION II

CACR05-1108

April 26, 2006

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR
PUBLICATION
ANDREE LAYTON ROAF, JUDGE

APPEAL FROM LONOKE COUNTY
CIRCUIT COURT
[NO. CR-2003-500]

RODNEY EUGENE RHODEN

APPELLANT

v.

HONORABLE LANCE L. HANSHAW,
CIRCUIT JUDGE

AFFIRMED

STATE OF ARKANSAS

APPELLEE

Appellant Rodney Rhoden was convicted by a jury of residential burglary, three counts of terroristic threatening in the first degree, and battery in the third degree. The trial court sentenced him to a total of eighteen years' imprisonment. Rhoden now appeals, asserting that there was insufficient evidence to support his convictions. We affirm.

On or around December 8, 2003, Jerry Gates informed appellant Rodney Rhoden that his wife, Shannon Rhoden, had been talking to Jeanette Miller about their marital problems, and that Miller had stated that she would leave her husband if he treated her like Rhoden treated Shannon. Gates then told Rhoden that he needed to get his wife "in check" because she should not have been discussing personal business with Jeanette.

Rhoden became extremely upset at this news, and he took his wife to Miller's home in response. Witness testimony concerning what occurred after this point varied greatly. Dorothy Felton, a caregiver for Care Link of Arkansas, testified that she was in the Miller residence providing care for Jeanette's elderly mother on the date in question; Jeanette was also present in the home at the time. Dorothy stated that, around lunchtime, she heard raised voices coming across the yard and that someone knocked on the back door, so she hollered for Jeanette to come to the door. Around the time Jeanette walked into the kitchen, Rhoden came in the door, started cursing at her and calling

her names, and then grabbed her by both arms and pulled her outside. Jeanette also testified that she did not open the door and invite Rhoden into her home. However, Shannon testified that after Rhoden knocked on the door, it sounded like someone said come in.

Dorothy further testified that Rhoden was angry because Jeanette had "been running her mouth about him and his wife," and that he threatened Jeanette, threatened to get her, and also threatened to go get his gun and come back and kill everyone in the house. She also stated that she saw Rhoden threatening Jeanette with a tree limb, but that she did not witness him strike her with it. In addition, Dorothy stated that she was not present for the entire altercation because she was afraid and had hidden under her car and then went to tell Mr. Miller what was going on; she also testified that the situation unnerved her so much that she never went back to care for Jeanette's mother again.

Jeanette testified that she was watching television with her mother when she heard a commotion in the back of the house. By the time she reached the kitchen, Rhoden and his wife had opened the door and were in the house; Rhoden was holding a stick, was angry and was screaming. She testified that he told her that she was coming with him because she had "some things to fix." She stated that she did not agree to go with him but that he pulled her outside. She further testified that he was squeezing her arm and that he had a big stick with him and used it to poke her in the arm and stomach.

Jeanette stated that she somehow got away from Rhoden and ran back into the house and dialed 911. At this point, she claimed that he followed her into the house and grabbed her again and told her that if she used the phone to call the police he would kill her and her mother, so she terminated the call. Rhoden then grabbed her again and said that he was going to get a gun and shoot and kill Jeanette and her mother. Jeanette then testified that she told her mother that they were leaving to go get Jeanette's younger daughter, Brandy, and that Rhoden said, "Well, I'm going to get her, too." She stated that Rhoden left after he made these threats.

Shannon testified that she willingly accompanied her husband to the Miller residence. She claimed that they knocked on the door and were invited into the home. She admitted that he was

angry and that he was raising his voice, but stated that she and he frequently spoke to each other like that. She also testified that Rhoden told Jeanette that she needed to come with them so that they could go and confront Gates about what was actually said. She stated that Rhoden never threatened to kill Jeanette, although he did threaten to "beat her a**." Dorothy also testified that she remembered hearing Rhoden threaten to beat Jeanette's a**. Shannon further testified that she did not witness Rhoden hitting Jeanette with a stick and that he only picked up the stick after he had a confrontation with Jeanette's husband.

The 911 operator testified that she received a call from the Miller residence on the date in question and that the phone went dead at one point, so she had to call the number back. Deputy Josh Rainbolt testified that he was the second unit to arrive on the scene, that he tried to ascertain what was going on, and that he learned that the suspect had fled the scene on a four-wheeler. He stated that it took a while to get a statement about what happened because Jeanette was "hysterical." After learning Rhoden's identity, the police broadcasted his name on the radio and began a search of the area with the help of a dog team trained to track suspects. Detective Biggs testified that, later in the day, he encountered Rhoden coming out of his hiding place in the woods accompanied by the police dogs. At this point, Rhoden was ordered to the ground and told that he was a suspect in a felony.

Rhoden was charged with residential burglary, three counts of terroristic threatening in the first degree, and battery in the third degree. At the close of the State's case, Rhoden moved for a directed verdict on the basis that there was no evidence that he entered the Miller residence with the intent to commit an offense punishable by imprisonment; he also claimed that there was no evidence that he intended to cause the bruises to Jeanette. In addition, the terroristic threatening charges included a threat against Brandy Miller, and there was uncontroverted evidence that she was not even at home when the threats occurred. The court denied the motion. After the defense rested, Rhoden renewed the motion, making the same argument. The court again denied the motion.

After the State presented rebuttal evidence, Rhoden renewed his motion to dismiss the charge of residential burglary based on the fact that the state has to prove that he entered or remained unlawfully in the home with the intent of committing a crime punishable by imprisonment. In

addition, Rhoden argued that even if he did threaten to whip Jeanette's a**, he did not threaten to kill or do serious bodily injury to anyone; thus, his terroristic threatening charges should also be dismissed. The court again ruled that there was sufficient evidence to present the question to the jury.

The jury convicted Rhoden on all counts, and he was sentenced to eighteen years for the residential burglary, two years for each count of terroristic threatening, and one year for the battery in the third degree. The trial court ordered that the sentences be served concurrently.

On appeal, Rhoden argues that the trial court erred in denying his motions for directed verdict because the State provided insufficient evidence to sustain convictions for residential burglary or terroristic threatening. In its reply brief, the State asserts that portions of Rhoden's claims are barred because the arguments were not made to the trial court.

When reviewing a challenge to the sufficiency of the evidence, the appellate court will affirm a conviction if there is substantial evidence to support it, when viewed in the light most favorable to the state. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Substantial evidence is that which is of a sufficient force and character that it will, with reasonable certainty, compel a conclusion without mere speculation or conjecture. *Id*. A jury may resolve questions of conflicting testimony. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). In addition, it is not the function of the appellate court to weigh the evidence or judge the credibility of the witnesses. *Warren v. State*, 272 Ark. 231, 63 S.W.2d 97 (1981).

A directed verdict motion during a jury trial shall be made at the close of the prosecution evidence and at the close of all evidence; in addition, the motion shall state "the specific grounds thereof." *See* Ark. R. Crim. Pro. 33.1(a). A challenge to the sufficiency of the evidence is not preserved for appeal if it is not made at the "times and in the manner required." Ark. R. Crim. Pro. 33.1(c). Rule 33.1 of the Arkansas Rules of Criminal Procedure is to be strictly construed. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002).

With respect to the terroristic threatening convictions, at the close of the State's rebuttal evidence, Rhoden renewed his motion for a directed verdict, specifically arguing that, although he

threatened to whip Jeanette's a**, this did not rise to the level of threatening to kill or do serious bodily injury to her. The State contends that this argument only preserves an objection to Rhoden's conviction of terroristic threatening of Jeanette but does not preserve an objection to the terroristic threatening of Jeanette's mother or daughter. We agree and will only consider Rhoden's conviction for terorristic threatening toward Jeanette.

A person commits the offense of terroristic threatening in the first degree if he or she purposely terrorizes another with the threat of death or serious physical injury or substantial property damage to another. Ark. Code Ann. § 5-13-301(a) (1) (A) (Repl. 1997). A terroristic threat need not be verbal, nor must the threat be communicated by the accused directly to the person threatened. *Lowry v. State*, ---Ark. ---, ---S.W.3d--- (Oct. 20, 2005). Moreover, it is not necessary that the recipient of the threat actually be terrorized, and there is no requirement that the State prove that the accused had the immediate ability to carry out the threats. *Id.* However, the accused must intend for the threat to fill the recipient with intense fright; in other words, it must have been the conscious object of the accused to cause fright. *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988).

A person's intent or purpose cannot normally be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence; therefore, the jury is allowed to draw upon common knowledge and experience. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002). In addition, there is a presumption that the accused intends the natural and probable consequences of his actions. *Price v. State*, 247 Ark. 718, 66 S.W.3d 659 (2002).

In *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988), the Arkansas Supreme Court affirmed Smith's seven convictions for terroristic threats, concluding that terroristic threatening is not defined as a continuing course of conduct crime and that appellant was properly convicted of all seven counts because he pulled out a pistol and threatened to kill everyone in the building and there were seven people in two offices in the building at the time. In addition, the court emphasized that the statute prohibits the communication of threats with the purpose of terrorizing another, but there is no requirement that the person actually be terrorized. *Id*. Similarly, in *Mason v. State*, --- Ark. ---, ---S.W.3d --- (Apr. 14, 2005), our Supreme Court affirmed Mason's conviction for terroristic

threatening where he had threatened to kill the victim during the course of physically attacking her, stating that there was sufficient evidence to establish that Mason intended to terrorize the victim.

In the present case, while there was varied testimony on what actually occurred during the altercation, Jeanette testified that Rhoden threatened to kill her and her mother if she tried to call the police again. She also testified that Rhoden threatened to kill her, her mother, and Brandy before he fled. In addition, Dorothy Felton testified that she heard Rhoden threaten to go get his gun and kill everyone in the house. From this testimony, the jury could infer that Rhoden made his threats with the conscious object to frighten Jeanette. It is sufficient that Rhoden threatened to cause death with the intent to instill fright; it was not necessary for the State to prove that Jeanette was actually frightened, that Rhoden terrorized her over a long period of time, or that Rhoden was immediately able to carry out the threats.

Rhoden also argues that there was insufficient evidence to support the burglary conviction because there was no evidence that he entered the residence unlawfully with the intent of committing a crime punishable by imprisonment.

A person commits residential burglary if, with the purpose of committing an offense punishable by imprisonment therein, he enters or remains unlawfully in a residential structure of another. *See* Ark. Code Ann. § 5-39-201 (Repl. 2006); *Campbell v. State*, 289 Ark. 454, 712 S.W.2d 302 (1986). Rhoden argues that the State had to prove that he unlawfully entered the house; however, the State may show that he either entered the house with the purpose of committing an offense punishable by imprisonment *or* that he unlawfully remained in the house in order to commit a crime punishable by imprisonment. (Emphasis added.)

While entry into the building is an essential element of burglary, *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988), there is no doubt that Rhoden entered the home, whether he believed someone said come in or not. Rhoden also erroneously argues that the State had to show that Rhoden entered the house with the purpose of committing a felony. *See Brown v. State*, 12 Ark. App. 132, 671 S.W.2d 228 (1984) (stating that offenses punishable by imprisonment include misdemeanors).

A person acts "purposely" when it is "his conscious object to engage in conduct of that nature or to cause such a result." Ark. Code Ann. § 5-2-201(1) (Repl. 2006). The crime of burglary can be complete even though the intention to commit a crime is not consummated; however, the facts proven incident to the entry must show circumstances of such probative force as to reasonably warrant the inference of that purpose on the part of the accused. *Washington v. State*, 268 Ark. 1117, 599 S.W.2d 408 (Ark. App. 1980). Purpose can be established by circumstantial evidence, but that evidence must be such that the requisite purpose can be reasonably inferred, and the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable conclusion. *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998).

In *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986), Henry admitted to stealing items from the victim's home, but he argued that there was insufficient evidence to sustain a burglary conviction because he did not intend to take anything when he entered the home. He claimed that he entered the victim's property to retrieve his dog, and only entered the house, under the belief it was vacant, after noticing the door was slightly ajar. *Id*. This court found that the jury could reasonably infer that Henry's unlawful entry was accompanied by an intent to commit theft and that the jury was not required to believe his testimony that he did not intend to steal anything when he entered the home. *Id*.

In *Campbell*, *supra*, our Supreme Court reversed Campbell's burglary conviction based on insufficiency of the evidence. Campbell had appeared on the front porch of a home, threatened the owner who was sitting on the porch at the time, and fled through the house when the victim's screams brought several neighbors to the scene. *Id*. The court stated that the State did not prove that entry upon the porch was unlawful because such premises were open to the public and that there was no proof that Campbell entered the house for the purpose of committing an offense in the course of his efforts to escape apprehension. *Id*.

In *Washington*, *supra*, this court reversed Washington's burglary conviction. Washington testified that he and his cousin were visiting his aunt's home when they heard a noise coming from the victim's apartment; his aunt told them to go and see if anyone was breaking in because the victim

was frequently away from her home and the apartment had recently been burglarized. *Id*. Washington and his cousin noticed that the board covering the window of the apartment was lose and that there was broken glass; they entered the apartment to investigate, and the victim called the police. The court found that there was substantial evidence tending to show that Washington and his cousin went to the apartment simply to investigate a noise and that, while the two could have been charged with criminal trespass for entering the apartment, there was no evidence that they went to the apartment with the purpose of committing any crimes.

Rhoden was sentenced to eighteen years for the residential burglary charge; we find that there was sufficient evidence to support the conviction. This case is most similar to *Henry*. Although Rhoden claims that he went to the Miller household simply to talk to Jeanette, the jury was free to believe that he entered the home with the purpose of causing harm to Jeanette. All of the witnesses testified that Rhoden was furious when he confronted Jeanette. Dorothy Felton even stated that it looked as though Rhoden was "foaming at the mouth." Jeanette testified that Rhoden had the stick in his hand when he came into the house. In addition, Rhoden entered the home a second time when Jeanette escaped from his grasp and went to call 911. Rhoden followed her back into the house, and this time he was clearly uninvited. At that point he threatened to kill Jeanette and her mother if she tried to call the police again. In addition, Rhoden fled from the scene after he threatened to kill Jeanette, her mother, and Brandy, and the action of the accused in fleeing from the scene of a crime is circumstantial evidence that may be considered in determining probable guilt. *Christee v. State,* 25 Ark. App. 303, 757 S.W.2d 565 (1988). It is up to the jury to resolve issues of credibility, and under these circumstances, the jury could have concluded that Rhoden entered the home with the purpose of committing a crime punishable by imprisonment, namely to cause physical harm to Jeanette.

Rhoden's final argument is that the State failed to prove the physical injury element of third degree battery. A person commits third degree battery if "(1) With the purpose of causing physical injury to another person, he causes physical injury to any person; or (2) he recklessly causes physical injury to another person." Ark Code Ann. § 5-13-203 (Repl. 2006). Physical injury is defined as

"(A) impairment of physical condition; (B) infliction of substantial pain; or (C) infliction of bruising, swelling, or visible marks associated with physical trauma." Rhoden argues on appeal that there was no testimony of the impairment of physical condition or the infliction of pain, and that there was only testimony of two bruises with no evidence that they were associated with a physical trauma.

The State correctly contends that this argument is not preserved for appeal because Rhoden failed to address it at the close of all of the evidence. Proof of the element of the crime that is alleged to be missing must be specifically identified in a motion for directed verdict. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997). Moreover, a party cannot change the grounds for an objection or motion on appeal, but is bound by the nature and scope of arguments made at trial. *Mayes v. State*, 351 Ark. 26, 89 S.W. 3d 926 (2002).

After the close of the State's case, Rhoden argued that there was "no evidence that he intended to cause the bruises on her." At the close of all evidence, Rhoden failed to state that he was renewing all motions made at the close of the State's case. Instead, he specifically renewed the motions for directed verdict with respect to the charges of residential burglary and terroristic threatening and made no mention of the battery charges, effectively abandoning his argument. Accordingly, his argument as to the sufficiency of the physical injury evidence is procedurally barred. *See Patrick v. State*, 314 Ark. 285, 862 S.W.2d 239 (1993).

Affirmed.

PITTMAN, C.J., and GRIFFEN, J., agree.